clear and present danger rule was applicable even under the decision of the *Gitlow* case. For subd. 1 of § 9 punishes causing of insubordination in the armed forces in language almost identical with subd. 2 of the third section of the Espionage Act. That punishes anyone who

> "shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

Subdivision 1 of the present statute makes it unlawful for anyone

> "to advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the military or naval forces of the United States."

We submit that both of these sections punish a substantive evil rather than a specific type of utterance. The criminal syndicalism laws discussed in the *Gitlow* and *Whitney* cases and the provisions of § 10 of the statute involved in the case at bar are statutes of the latter type. Whatever may be the view of this Court as to the survival of the rule of the *Gitlow* case we submit that as to the prosecution under § 9 the rule of the *Schenck* case is clearly applicable.

If we are correct on either aspect of the case the judgments of conviction cannot stand. For the verdict of guilty was a general one (R. 72-74). It is impossible, therefore, to tell whether it was based on § 9 or on § 10. In such a situation a judgment of conviction cannot stand. (See *Stromberg* v. *California,* 283 U. S. 359).

POINT III

The indictment is in the words of the statute which is too general to inform a defendant of the nature of the accusation made against him. The ways and means alleged in the indictment for the consummation of the conspiracy cannot be considered as part of the charging section. If they can they are too general and vague to make the charging section sufficient in law.

The charging section of the second count of the indictment is in the exact words of the statute. It adds that "the said Defendants and co-conspirators would, and they did, attempt to carry out and accomplish said conspiracy in the manner set out at numbered paragraphs One to Thirteen, inclusive, in the first count of this indictment" (R. 12).

This Court has held that an indictment in the language of the statute is not sufficient unless the statute itself is so clear and specific that the mere adoption of the statutory terms in the indictment apprises the defendant of the precise nature of the offense with which he is charged. *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Simmons*, 96 U. S. 360.

It is difficult to see how it can be contended that the statute involved in this case is so clear and specific that an indictment limiting itself to the language of the statute would be sufficient. It seems to be clear that the statute could not be any more general than it actually is.

Government counsel argued, and the Circuit Court of Appeals in its opinion adopted that argument, that the statute is sufficiently specific so that an indictment in its language is sufficient. And even if that were not so, the second count of the indictment incorporated by reference the means and methods, enumerated in the first count, by which it was alleged the petitioners intended to use or did use in carrying out the conspiracy. These ways and means, it is contended, made the charging section sufficient in law.

The answer to the last argument is two-fold. In the first place the enumeration of means and methods intended to be used or that were used to consummate the conspiracy cannot support a defective charge of conspiracy. *Asgill, et al.* v. *United States,* 60 F. (2nd) 780 (C. C. A. 4th).

In the second place the means and methods enumerated in the indictment (these are printed in the Appendix, pp. 28-32) are either not applicable to the second count upon which the petitioners were convicted or are just as general and vague as the charging section of the indictment.

There is practically nothing in the "ways and means" section of the first count (R. 7-10), which was incorporated by reference in the second count (R. 12) as to how the defendants were to advocate the overthrow of the Government by force or how they were to create insubordination in the armed forces. None of the documents or the papers of the party is mentioned. From the wording of the indictment it is quite justifiable to conclude that all the defendants did was to get together in some room and say, "Let's advocate the overthrow of the Government by force and let's cause insubordination in the armed forces", and then dispersed.

POINT IV

The evidence is insufficient to support the verdict.

(a) It does not show that the petitioners conspired to advocate the overthrow of the Government by violence.

(b) It does not show that the petitioners conspired to cause insubordination in the armed forces.

(c) It does not show that the petitioners had knowledge of the nature of the conspiracy, that is, that petitioners interpreted the program of the Socialist Workers Party to mean that it advocated the overthrow of the Government by force and the causing of insubordination.

(d) It does not show that certain of the appellants were parties to the alleged conspiracy after enactment of the statute.

A. Advocacy of violence.

To prove that the defendants conspired to advocate the overthrow of the Government by violence the Government had recourse to two types of proof: one consists of statements which, according to witnesses for the Government, were made by some of the defendants on various occasions; the other type is documentary in nature, consisting of resolutions, declarations, articles or excerpts therefrom, found in the press of the Socialist Workers Party, and pamphlets and books or excerpts of the same published for the party or found in its headquarters in either Minneapolis or St. Paul.

Petitioners contend that a consideration of all the documentary evidence, especially the official Declaration of Principles and the pamphlet *What Is Socialism,* written by the petitioner Albert Goldman, clearly indicates that the Socialist Workers Party does not *advocate* but *predicts* that the social revolution will be accompanied by violence. Such violence will be organized by the capitalist minority determined to prevent the establishment of a socialist regime by the majority of the people.

The Government can at best make out a case for the advocacy of violence to overthrow the Government by taking a few quotations out of the more than two hundred exhibits introduced into evidence. The Socialist Workers Party, during the three years covered by the indictment, issued a weekly paper more than 150 times and a monthly magazine more than 40 times and several dozen pamphlets. Out of all this material there are about ten excerpts which the Government introduced into evidence and which deal directly or indirectly with the question of violence as a method for the ushering in of socialism. There are many exhibits referring to violence, but upon examination it will be seen

that they refer to *defensive* violence against fascist or other anti-labor organizations prior to the time when the masses will gain power.

Among all the exhibits there is only one which in reality can be said to declare in so many words that the overthrow of government (not of the Government of the United States, but of all "existing social conditions") can be attained only by force. This is an excerpt taken from the *Communist Manifesto,* written in 1848 by Karl Marx and Frederick Engels. The book itself was introduced as Government's Exhibit 74 and the excerpt referred to is 74-A (R. 352).

In the case of *Schneiderman* v. *United States,* 319 U. S. ....., this Court considered that very excerpt and arrived at the conclusion for which the petitioners contended throughout the trial and in their brief to the Circuit Court of Appeals. This Court held that the *Communist Manifesto* must be interpreted in the light of the conditions prevailing at the time it was written. It also took cognizance of the fact that Karl Marx, the chief author of the Manifesto, subsequently concluded that in England, where democracy prevailed, the social revolution could be achieved in a peaceful manner.

It is only by taking out a few excerpts from the official documents of the party that a case can be conceivably made out for the proposition that the Socialist Workers Party advocates the overthrow of the Government by violence. In the same way could it be contended that Christ came not to bring peace but a sword and to "set a man at variance against his father and the daughter against her mother".

When the official documents and the writings of the responsible leaders of the party and of recognized Marxists are considered in their totality, the conclusion is inescapable that Marxism and the Socialist Workers Party, the program of which is based on the teachings of Marxism, only *predict* that the social revolution will be accompanied by violence and do not advocate violence.

The Trial Court should have so instructed the jury.

Moreover, there was no evidence that any of the material on which the Government bases its case was distributed by the Party after the date of the statute. It is true that the pamphlet "What is Trotskyism" (Exhibit 36, R. 261-267) was published after that date. But this pamphlet was not written by any of the defendants and there is no evidence that any of the defendants had anything to do with its publication or that they were acquainted with its contents. It is significant that it was not printed but only mimeographed and that at the time of the search by the Government agents, only three copies were found (R. 252).

We submit, therefore, that whatever might be the interpretation of the material distributed prior to the enactment of the Smith Act, there is no basis whatever for the conviction of these petitioners under § 10.

B. Insubordination in the armed forces.

There is no evidence in the record showing a conspiracy to cause insubordination in the armed forces.

In its opinion the Circuit Court of Appeals states that the record contains substantial evidence of the purpose of the Socialist Workers Party to create insubordination in the armed forces by propaganda therein.

An examination of the pages in the record cited by the Circuit Court of Appeals to support its conclusion shows that such testimony as is based on documents *has nothing whatever to do with creating insubordination in the armed forces.* They deal with such questions as advocating military training under trade union control, greater democracy in the army, election of officers in the armed forces, and opposition to what the petitioners designate as an imperialist war.

In their literature, as the testimony shows, the Socialist Workers Party was absolutely opposed to sabotage or obstructing the conduct of the war by the Government (see Exhibit K, R. 1125-1128). It is only by assuming that the

ideas of the Socialist Workers Party would necessarily cause insubordination in the armed forces (an assumption which Government counsel seem to hold. See Mr. Schweinhaut's cross-examination of petitioner Cannon, R. 986-987) that it can be said that the Socialist Workers Party is guilty of conspiring to cause insubordination in the armed forces.

The testimony that deals with the causing of insubordination consists of oral statements alleged to have been made by some of the petitioners to the witnesses. They can be found at the following pages of the record:

James Bartlett (R. 277-279, 280, 457-458, 462-464).
Roy F. Wieneke (R. 494).
John J. Novack (R. 515).
Henry Harris (R. 543, 548).
Emanuel G. Holstein (R. 657).
Sidney Brennan (R. 685-686, 688).
Eugene J. Williams (R. 741-742).

Drawing all inferences from this testimony in favor of the Government, it can be summarized as follows: (1) *if* the Selective Service Act is passed, or (2) *if* members of the Socialist Workers Party are drafted, and (3) *if* this country enters into the war, the Socialist Workers Party will then spread dissension and cause dissatisfaction by complaining about the food and bedding. This conspiracy therefore could go into effect only upon the fulfillment of certain conditions which after all might never occur. Furthermore, it must be assumed that the food and bedding would be unsatisfactory. Suppose they were excellent—what then? If they were not satisfactory, would kicking about them constitute insubordination?

It is important to note that there is no evidence to show that disaffection in the armed forces was actually created, or that the persons who were allegedly advised to complain about food and bedding ever went into the armed forces.

The testimony introduced by the Government to prove the charge of conspiracy to cause insubordination, all of which is listed above, can hardly be taken seriously. Certainly, it was inadequate to justify the Court in permitting this question to go to the jury.

But even assuming that sufficient weight could be given to the testimony to justify the Court in submitting to the jury the question of causing insubordination, there is no evidence of any *conspiracy* on the part of the appellants. At best the testimony with reference to that section of the second count refers to statements attributed to only seven defendants. There is no evidence that the other defendants knew anything about these statements or consented to them. They could not be bound by such statements; nor could such statements be interpreted to mean that a conspiracy existed to cause insubordination.

C. Evidence as to particular petitioners.

There is no evidence whatever, with reference to any of the petitioners, that they interpreted the program of the Socialist Workers Party to mean advocating the overthrow of the Government by force or the causing of insubordination in the armed forces.

In its opinion the Circuit Court of Appeals treats this question as one simply of having knowledge of the nature of the program. The fact that the petitioners were leading members of the party is cited by the Court below as an argument that they must have known the nature of the party program. *But that is not the question.*

Admittedly they knew the program. *The question is whether they interpreted the program to mean advocating the violent overthrow of the Government or advocating creating insubordination in the armed forces.*

In the *Schneiderman* case (*supra*) this Court expressly held that where two interpretations of the program of a party are possible, one reprehensible and the other permissible, the Court cannot attribute the reprehensible one to a member of the party in the absence of overt acts indicating that such was his interpretation.

There is in this case a serious dispute as to the correct interpretation of those sections of the party program which deal with the transformation of the capitalist order into a socialist system. It was necessary therefore for the Government to prove not only that the defendants knew the program but that they interpreted it in the reprehensible manner.

In the case of one of the petitioners the documentary evidence in the record proves that he interpreted Marxism to mean *prediction* of violence rather than advocacy (see Exhibit 42, R. 1220-1273). This petitioner, as well as others, were convicted not because they advocated violence, not because they interpreted the program to mean that it advocated violence, but because, in the jury's opinion, they were wrong in the interpretation they gave to the program.

If this petition is granted, we shall in a brief analyze all of the evidence with reference to each defendant. For the purpose of this petition we contend for the recognition of the general principle that it is necessary for the Government, as part of its case, to prove that each defendant interpreted the program of the organization to which he belonged as meaning advocacy of violence or of creating insubordination in the armed forces.

D. Membership subsequent to enactment of statute.

As to certain petitioners there is no evidence whatever that they were members of the alleged conspiracy after the date of the enactment of the statute upon which the second count of the indictment is based.

The statute for the alleged violation of which the petitioners were convicted was enacted June 28, 1940. The Government proved that all the defendants were members of the Socialist Workers Party at some time between July 15, 1938 and June 28, 1940. Did that constitute a *prima facie* case of membership after June 28, 1940?

Government counsel expounded the theory that prior to June 28, 1940 the party constituted a conspiracy to violate

Sec. 6, Title 18, the basis of the first count of the indictment; that subsequent to June 28, 1940 this same conspiracy continued but added another crime to its calendar, namely, the one prohibited by Secs. 9, 10 and 11 of Title 18, constituting the basis of the second count (R. 846).

Since the jury acquitted the defendants on the first count, it must be presumed that there was no illegal conspiracy prior to June 28, 1940. In other words, membership in the party, assuming even that it advocated the overthrow of the Government by violence, was perfectly legal prior to June 28, 1940. It became illegal only after that date. Hence it was the duty of the Government to prove membership in the party subsequent to June 28, 1940.

It cannot be presumed that membership in a legal organization is presumptive evidence of continued membership after the organization has been made illegal. *The presumption must be quite the contrary.*

We shall not proceed to a detailed analysis of the nature of the evidence which the Government relies on to prove membership of some of the petitioners subsequent to the enactment of the statute. That will be done in a separate brief if this petition is granted.

We need only remark that the Government in its brief filed in the Circuit Court of Appeals admits that two of the petitioners were proved to be members only up to the spring of 1940, that is, prior to the enactment of the statute. The brief then goes on to state that the evidence with reference to these two petitioners is "sufficiently proximate to June 28, 1940 to justify the jury's conclusion".

It is quite clear, therefore, that the Government contends that proof of membership in the party prior to June 28, 1940 is sufficient to prove membership subsequent to that date, thus punishing an individual for an act which was not criminal at the time of its commission.

CONCLUSION

It is respectfully submitted that a writ of certiorari be granted to review the order of the Circuit Court of Appeals for the Eighth Circuit so that the judgments of conviction herein may be reversed.

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Counsel for Petitioners.